SUPREME COURT, U. S.
FED 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1235

AMERICAN INVESTORS ASSURANCE COMPANY,
a corporation and
STATE INSURANCE COMMISSIONER OF THE STATE
OF UTAH,
Petitioners,

v.

FIRST NATIONAL BANK OF ALBUQUERQUE,
TRANSCONTINENTAL TRUST COMPANY, a corporation and
NATIONAL CAPITAL LIFE INSURANCE COMPANY,
a corporation and
RUSSELL G. FARKAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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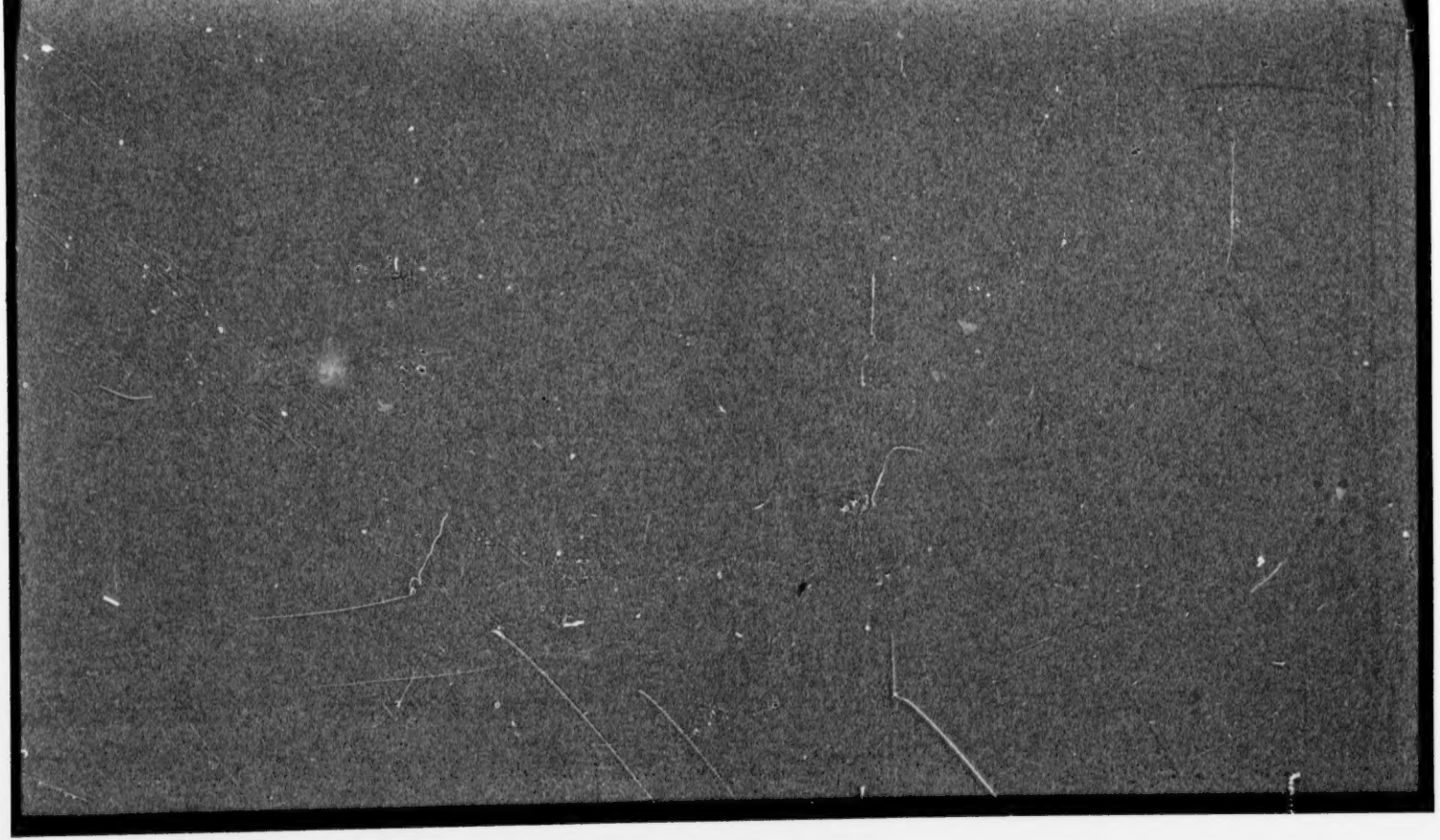

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a corporation and
RUSSELL G. FARKAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Writ of Certiorari is respectfully sought to the United States Court of Appeals for the 10th Circuit in the matter of American Investors Assurance Company, a corporation, State Insurance Commissioner of the State of Utah, Rehabilitator v. First National Bank of Albuquerque, No. 72-1794.

OPINIONS BELOW

The opinion of the District Court for the District of New Mexico has not been officially reported and is appended hereto as Appendix A. The opinion of the Court of Appeals has not been officially reported and is attached hereto as Exhibit B.

JURISDICTION

The court has jurisdiction to review this matter on Writ of Certiorari under 28 U.S.C. § 1254. The judgment of the Tenth Circuit Court of Appeals sought to be reviewed was dated and entered on June 27, 1973 and an order denying rehearing was entered November 12, 1973.

QUESTION PRESENTED

Is a contract for the investment or use of the assets of an insurance company illegal and against public policy when such an investment or use is prohibited by state law and if so, may the parties to such a contract waive the illegality and the interests of the public in protecting the assets of an insurance company against the need of the policyholders by refusing to raise these issues at trial and thereby preclude a reviewing court from considering these issues, or does a reviewing court itself have a duty to raise the issues of illegality and public policy *sua sponte* as guardians of the public interest when it appears from the record that to allow the contract to be enforced defeats the very purpose of the statutes and deprives the public of the very protection which the state legislature intended.

STATUTES INVOLVED

The pertinent Utah State statute which renders the guarantee contract in question void and against public

policy is Chapter 13, Title 31, Utah Code Ann. (1953) as amended. This chapter strictly regulates the manner in which a domestic Utah insurance company may invest and deal with its assets. It is a lengthy chapter and is therefor set forth in the appendix hereto.

STATEMENT OF THE CASE

American Investors is an insurance company created under Utah law. Since September 30, 1971, the insurance company has been under the exclusive control of the Insurance Commissioner of the State of Utah by reason of an order of rehabilitation (receivership proceeding) granted by the District Court of Salt Lake County, Utah.

On or about October 17, 1968, the First Security Bank of Utah loaned to the respondent Transcontinental Trust Co. the sum of $1,250,000. This loan was guaranteed by the insurance company.

In May of 1971, the loan from First Security Bank of Utah was overdue; and respondent Farkas, the Executive Vice-President of the insurance company contacted the respondent bank in Albuquerque and arranged to have the parties to the lawsuit enter into a loan agreement whereby the Bank loaned to the respondent National Capital Life Insurance Company, the sum of $214,360 and loaned to Transcontinental Trust Co. the sum of $625,000.

The insurance company through respondent Farkas, agreed to guarantee the loans made to the other respondents and in compliance with the pledge agreement the insurance company pledged as security corporate and municipal bonds and securities in the par

value of $701,000 and certificates of deposit in the sum of $445,000.

As a result of its guarantee of the loans of the Bank and its pledge of security for these loans the insurance company did not have sufficient funds to insure the payment of valid claims of policyholders and therefore was taken over on September 30, 1971 by the Utah State Insurance Commissioner.

Suit was brought by the petitioners in the United States District Court for the District of New Mexico, to recover the securities so pledged or their value. Jurisdiction was based on diversity of citizenship and an amount in controversy in excess of $10,000. The bank filed a counterclaim to recover the amount due on the loans they had made and to proceed against all collateral which had been pledged in support of the guarantee by the insurance company. For reasons not appearing in the record, at a pre-trial conference the attorney for petitioner waived any issue of illegality or public policy. A non-jury trial was held in Albuquerque on April 9, 1972; and the bank recovered judgments on its counterclaim.

The judgment of the District Court was duly appealed and the case was argued before the Circuit Court of Appeals for the 10th Circuit on the 24th day of May, 1973. The petitioners asserted the trial court erred in holding that the guarantees given by the insurance company to the bank were enforceable because they were as a matter of law illegal and against public policy and the court should have so held on its own motion.

On the 27th of June, 1973, the Circuit Court of Appeals for the 10th Circuit entered its order affirming

the judgment of the trial court. As part of its opinion in this case the Circuit Court stated:

> "The principle issue raised on appeal by A.I.A. and the Commissioner is their assertion that the 'guarante ' agreement is illegal and gainst public policy in New Mexico and in Utah. The plaintiffs assert that an insurance company such as American Investors cannot legally pledge its assets to guarantee a loan made to a third party.
>
> As indicated above, the ult:a vires issue was fully tried, but the records show that an issue of illegality or against public policy was not. Such issues were included in the initial complaints, but no such claims or issues were included in the pre-trial order. At the conclusion of the trial, the Court said as part of its findings and conclusions: 'I do not conclude or find that the action of AIA was illegal in any respect or against public policy. Further, that issue has not been litigated in the lawsuit; it was not my understanding that there was an issue here, and even if it were, I would rule against AIA on that position.'
>
> We must conclude that the illegality issue was not tried. The appellants urged that there was evidence introduced but all they can point to is a copy of the Utah Statutes relating to Insurance Companies which was admitted together with a large group of exhibits agreed upon before trial. The attorney did argue to point in his final argument to the court. The issue was not raised in trial memoranda.
>
> Issues not tried in the trial court cannot be considered on appeal to this court. This has to be the rule because the trial court is the only place where the initial fact—law relationship can be developed and the facts resolved . . . . This issue here argued is the kind of an issue which must be raised in the trial court; the illegality or public

> policy relates only to corporate powers and this aspect does not place such issues in a different category. (Citations omittted.)

The Petitioners then filed with the 10th Circuit Court of Appeals a Petition for Rehearing, urging the Circuit Court that the Trial Court and even the Appeals Court has a duty where it appears that a contract is illegal or against public policy, to raise the issue on its own motion and consider the same. On November 12, 1973, the Circuit Court of Appeals denied Petitioners motion for rehearing without opinion.

REASONS FOR GRANTING THE WRIT

Utah, as well as all other states has adopted a comprehensive insurance code. It is designed to regulate all aspects of the insurance business from rate making to the management of company funds. Its main purpose is to protect, as much as possible, the public interest in the solvency of Utah Insurance companies. Insurance companies by their very nature are depositories of the public's funds through the payment of premiums. In a real sense they hold the savings and deposits of the public for safekeeping against their hour of need. To allow dissipation of these funds harms those of the public who most need the protection, namely widows, orphans, the sick and aged, and all others who rely on their insurance policies to carry them through their time of need. In direct response to this need of the public to protect such funds banks, trust companies, insurance companies and other monied corporations acting as depositories of the public's funds are subjected by the legislatures of the many states to state regulation and control. *See German Alliance Ins. Co.* v. *Lewis, Supra; Winston-*

Norris Co. v. *King,* 119 Okla. 109, 249 P. 219 (1926); *State* v. *Hyde,* 315 Mo. 681, 286 S.W. 363 (1936); *People* v. *Dillars,* 298 N.Y.S. 285 (1937) affd 298 N.Y.S. 296; 19 Appleman, Insurance Law and Practice Sec. 10015, 10343 (1940).

This court very early accepted the proposition that the business of insurance was one affected with a public interest and was subject to regulation by the states for the protection of policyholders. *See e.g. German Alliance Ins. Co.* v. *Lewis,* 233 U.S. 389, 414-15 (1914); *La Tourette* v. *McMaster,* 248 U.S. 465 (1919).

In furtherance of this policy, the Utah legislature has provided by law how and in what manner the assets of a domestic insurance company must be handled and invested Section 31-13-1(2) Utah Code Ann. (1953) provides:

> "Domestic insurers shall invest in or loan their funds on the security of, and shall hold as assets, only eligible investments as prescribed in this chapter."

The chapter then outlines all investments and uses of insurance company funds which are legal investments or uses. All investments or uses of assets not so approved are illegal. Nowhere in the chapter is there express or implied authorization to pledge insurance company funds to guarantee the debts of third parties. Such an unauthorized use subjects the insurance reserve of the company to dissipation without benefit to policyholders upon the default of the third party—such as happened in this case. If the courts then mandate the honoring of such a pledge, the power and ability of the states to protect in this manner the assets of insurance companies held in trust for the public is rendered ineffective.

Courts have historically refused to enforce contracts which are illegal or against public policy. *See e.g. Coppell* v. *Hall,* 74 U.S. (7 Wall) 542,559 (1869); *McMullen* v. *Hoffman,* 174 U.S. 639, 654 (1899); *Oscanyon* v. *Arms Co.,* 103 U.S. 261, 267 (1880); *United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520, 562 (1961).

This court has never ruled on the question of whether a contract for the use of an insurance company's assets in a manner prohibited by state law is an illegal contract or against public policy. A situation close to the one presented here was before this court in *Texas and Pacific Ry. Co.* v. *Pottorff,* 291 U.S. 245 (1934). In the *Pottorff* case, a bank regulated by the National Banking Act, guaranteed a deposit with a pledge of its assets. This court held that whether or not such a pledge was enforceable must be determined by the powers granted by statute. This Court stated

> "National Banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant and powers not conferred by Congress are denied." 291 U.S. at 253.

In the present case we have an insurance company, regulated by the state as to the uses it can make of its assets. To paraphrase this Court in *Pottorff, supra,*

> "The measure of the insurance company's powers is the statutory grant and uses not granted by statute are denied."

In the present case such power is certainly not granted by statute. The duty of an insurance company to protect the assets of its policyholders is identical with

the duty of a bank to protect its depositors. With respect to this duty in Utah, the Utah Supreme Court has stated:

> "It is said that the primary duty of a bank is to protect and maintain unimpaired the right of the depositor to get back his own by equivalent value without preference or priority to others. The plainest public policy demands that it be so maintained. Therefore anything which unavoidably and in the usual course of things tends to its impairment is contrary to public policy." *Hadlock* v. *Callister,* 85 Utah 510, 39 P.2d 1082, 1085. (1935)

The decision of the Tenth Circuit Court of Appeals in this case holds that if the issues of illegality and public policy are not raised by the parties or the court at the Trial Court level, "Where the initial fact-law relationship is developed," they cannot be raised on appeal. This holding appears to conflict with numerous decisions of this honorable Court. *See e.g. Coppell* v. *Hall, supra; Oscanyan* v. *Arms Co., Supra; Ritter* v. *Mutual Life Ins. Co.,* 169 U.S. 139, 154 (1898); *United States* v. *Mississippi Valley Generating Co., Supra.*

The *Mississippi Valley* Case is significant in that this Court outlines the factors to consider in determining if a contract should be enforced where some statute has been violated:

> "Having determined that Wenzell's activities constituted a violation of Section 434, we must next consider whether Wenzell's illegal conduct renders the contract unenforceable. It is true that Section 434 does not specifically provide for the invalidation of contracts which are made in violation of

the statutory prohibition. However, that fact is not determinative of the question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment, *e.g. Miller* v. *Ammon,* 145 U.S. 421; *Bank of the United States* v. *Owens,* 2 Pet. 527; 6 Williston, Contracts (rev. ed. (1938)) § 1763. Therefore, the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in Section 434.

As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred." 364 U.S. at 563.

The court went on to state:

"The question is whether the government may disaffirm a contract which is infected by an illegal conflict of interest. As we have indicated the pub-

> lic policy embodied in section 434 requires nonenforcement.
>
> * * *
>
> Although nonenforcement may seem harsh in a given case, we think that it is required in order to extend to the public the full protection decreed by enacting Section 434. *Id* at 566.

Under the situation in the present case, the same reasoning used by this Court in *Mississippi Valley* applies. To paraphrase the quoted sections above:

> Having determined that the insurance company's activities constitutes a violation of the Utah Code, we must next consider whether its illegal conduct renders the contract unenforceable. It is true that the Utah Code does not specifically provide for the invalidation of contracts made in violation of the statutory provisions governing investments, however, that fact is not determinative of the question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment. Therefore, the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in the Utah Code."
>
> As we have indicated, the primary purpose of the statute is to protect the public monies held in trust by insurance companies through regulating use of such assets. This protection can be fully accorded only if contracts which illegally deplete such assets may be disaffirmed by the state insurance commissioner. If the commissioner's sole remedy in a case such as that now before us is merely a criminal prosecution then the policyholders will be forced to bear the very burden which the Utah legislature has sought to prevent.

> Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of use of insurance company assets which the statute outlaws and we would be depriving the public of the protection which the legislature has conferred. Although nonenforcement may seem harsh in a given case, we think that it is required in order to extend to the public the full protection decreed by enacting the referred to sections of the Utah Code."

The ruling of the Tenth Circuit in this case also conflicts with the reasoning of the Third Circuit in a similar fact situation. In *Fitzsimmons* v. *Eagle Brewing Co.,* 107 F.2d 712 (3rd Cir. 1939) the parties themselves did not raise the question of illegality or public policy, however, the court stated:

> "The facts of the case at bar are reminiscent. The plaintiff-appellant, a Baltimorian, operating as the Camden Products Co. (New Jersey), manufactured malt syrup, a primary ingredient in the brewing of beer. The defendant-appellee a brewery, for reasons undisclosed by the record but easily conjecturable by United States Judges, lost its permit for the manufacture of near beer, the then legal kind, 27 U.S.C.A. §§ 4, 58; R. 45. Nothing daunted, it continued the purchase of plaintiff's malt and in those purchases enjoyed the enthusiastic cooperation of the plaintiff seller. In other words, and in plainer English, the plaintiff sold malt syrup in large quantities to a wildcat brewery and is now squealing because the learned trial judge had more regard for the public interest than it had. *We say the judge because the defense of illegality was not interposed by a welsher but, as was not only proper but necessary, by the Court sua sponte.* 107 F.2d 712.

CONCLUSION

If the instant contract is enforced as mandated by the trial and appellate courts, then the courts will affirmatively sanction the use of insurance company assets to guarantee the private debts of third parties, a use prohibited by the law and public policy of the State of Utah and will thereby deny to the public that protection which the Utah legislature has conferred by statute. The public interest requires a different result.

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 8985

Consolidated With No. 8984

AMERICAN INVESTORS ASSURANCE COMPANY, a corporation, and STATE INSURANCE COMMISSIONER OF THE STATE OF UTAH, *Plaintiffs and Counterdefendants*

v.

FIRST NATIONAL BANK IN ALBUQUERQUE, a National Banking Association, *Defendant and Counterclaimant*

TRANSCONTINENTAL TRUST COMPANY, a corporation

and

NATIONAL CAPITAL LIFE INSURANCE COMPANY, a corporation

and

RUSSELL G. FARKAS, *Defendants and Counterdefendants*

and

RUSSELL G. FARKAS, *Defendant and Third Party Plaintiff*

v.

C. A. McLIN, W. A. McLEOD AND JOHN DOE, Personal Representative of W. A. McLEOD, Deceased, *Third Party Defendants*

Amended Judgment

This matter having come on for trial, and the Court having heard and considered the evidence and the representations of counsel and having announced in one court its decision and its findings of fact and conclusions of law contrary to those so announced being hereby denied:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs American Investors Assurance Company and

State Insurance Commissioner of the State of Utah take nothing against the First National Bank in Albuquerque and Russell G. Farkas and that judgment against the complaints of the plaintiffs is entered in favor of those two defendants; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that First National Bank in Albuquerque do have and recover judgment against American Investors Assurance Company and National Capital Life Insurance Company in the principal sum of $208,360.00 with interest through May 12, 1971, in the sum of $20,599.55, and that against such judgment there be credited the sum of $73,585.25 paid by American Investors Assurance Company, and the sum of $68,745.21 paid by National Capital Life Insurance Company, leaving a balance due of $86,629.09; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that American Investors Assurance Company do have and recover judgment against National Capital Life Insurance Company for all amounts paid by it upon the indebtedness of National Capital Life Insurance Company owed First National Bank in Albuquerque and existing May 12, 1971, and that such judgment be satisfied as much as possible out of the mortgage loans assigned by National Capital Life Insurance Company to First National Bank in Albuquerque as collateral; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that First National Bank in Albuquerque do have and recover judgment against American Investors Assurance Company and Transcontinental Trust Company in the principal sum of $625,000.00, with interest through May 12, 1971, in the sum of $60,199.65; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that American Investors Assurance Company do have and recover judgment against Transcontinental Trust Company for all amounts paid by it upon the indebtedness of Transcontinental Trust Company to First

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National Bank in Albuquerque existing May 12, 1971, and that upon payment of this judgment by American Investors Assurance Company all collateral pledged by Transcontinental Trust Company to First National Bank in Albuquerque be delivered to American Investors Assurance Company as security for payment of its judgment; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that First National Bank in Albuquerque do have and recover judgment against American Investors Assurance Company for interest on the indebtedness of National Capital Life Insurance Company to First National Bank in Albuquerque from May 12, 1971 through April 24, 1972 in the sum of $11,853.39, for interest on the indebtedness of Transcontinental Trust Company to First National Bank in Albuquerque from May 12, 1971, through April 24, 1972, in the sum of $43,166.67, for interest on both debts from April 24, 1972, until paid as provided in the promissory notes, for its attorney fees in the sum of $20,000.00, and for its costs herein; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all documents executed by the parties to this action in connection with the loan transaction at First National Bank in Albuquerque on May 12, 1970, are in all respects valid and enforceable in accordance with their terms and that First National Bank in Albuquerque be, and it hereby is, authorized, directed and empowered to enforce all of the provisions of any loan agreement, notes, pledges, guaranty agreements or other security documents executed by any party to this action for the recovery of the judgments awarded herein; and

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Transcontinental Trust Company, National Capital Life Insurance Company and Russell G. Farkas do

have and recover their costs herein against the plaintiff American Investors Assurance Company.

IT IS FURTHER DIRECTED that this shall be a final judgment as to the claims covered hereby and the Court expressly determines that there is no just reason for delay and expressly directs the entry of this judgment as a final judgment in accordance with the provisions of Rule 54(b) of the Federal Rules of Civil Procedure.

HOWARD BRATTON
United States District Judge

Filed September 8, 1972.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 72-1794—May 1973 Term

Appeal from the United States District Court for the District of New Mexico

William G. Gibbs, Salt Lake City, Utah (Edward T. Wells, of Clyde, Mecham & Pratt, Salt Lake City, Utah, and Frank H. Allen, Jr., of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico, with him on the Brief), for Appellants.

Robert M. St. John, Albuquerque, New Mexico (Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, New Mexico, with him on the Brief), for Appellee, First National Bank in Albuquerque.

Harry A. Stewart, Jr., of Stewart & Pickrell, Ltd., Phoenix, Arizona (Maurice Sanchez, of Grantham, Spann, Sanchez & Rager, Albuquerque, New Mexico, with him on the Brief), for Appellee, Transcontinental Trust Company.

Oliver Burton Cohen, Albuquerque, New Mexico, for Appellee, Russell G. Farkas.

Robert Ong Hing, Phoenix, Arizona, for Appellee, National Capital Life Insurance Company.

Before SETH, Circuit Judge, LARAMORE,* Senior Judge, United States Court of Claims, and HOLLOWAY, Circuit Judge.

PER CURIAM.

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* Sitting by Designation.

American Investors Assurance Company, an insurance company created under Utah law, brought two actions against the First National Bank in Albuquerque to recover securities held by the bank under a pledge securing loans to third parties. The Utah Insurance Commissioner was later made a party plaintiff since he had become rehabilitator under Utah law for the American Investors Assurance Company, and by reason thereof was in exclusive control of the company. The bank filed a counterclaim for the amount due on the loans, and to proceed against the collateral pledged, and on the undertaking of American Investors. The counterclaim was also asserted against American Investors, National Capital Life Insurance Company, and Transcontinental Trust Company who had participated in the loan agreement. The counterclaim was for principal, interest, and attorney fees in various amounts against different counterdefendants.

The trial court gave judgment for the bank on the notes with interest and attorney fees. No recovery was allowed against the individual defendant, Russell G. Farkas, who was an officer of American Investors when the loans were made.

The various business transactions which gave rise to the loan by the bank are somewhat involved and need not be detailed here. It is sufficient to recite that the record shows that the First Security Bank of Utah loaned a substantial sum to the defendant, Transcontinental Trust Company, and there was deposited, as security notes, debentures, bonds, certificates of deposit, and shares of stock of several corporations. This loan was "guaranteed" by American Investors under an agreement whereby it would be paid for the guaranty and would receive other benefits out of the related transactions.

The loan to the Utah bank became overdue, and the defendant bank agreed to make loans to defendant, National Capital Life Insurance Company, and to Transcontinental Trust Company to pay off the Utah bank. In connection

with these loans, American Investors also pledged as security certificates of deposit, and entered into an agreement with the bank which plaintiffs term a "guaranty." By the agreement, American Investors agreed to take out the loan, that is, to buy out the bank's position, in event of a default by the third parties, the makers of the notes.

The loans were so made and the bank took collateral from American Investors and also took most of the security which had been held by the Utah bank.

The issues raised by appellants relate to the nature of the agreement which American Investors entered into with the defendant bank, the authority of defendant Farkas to bind American Investors to the undertaking, and the matter of postmaturity interest.

The trial court found that the loan agreement of American Investors was not ultra vires, that Mr. Farkas had the authority to bind the company, and that it was otherwise duly authorized and binding. The court further found that the Utah Insurance Commissioner knew of the proposed undertaking before it was entered into, and that Mr. Farkas was acting for the benefit of the corporation as there was an expectation that a substantial amount of money would be made by American Investors out of the transaction which led up to the loan. The trial court found that the various loan documents were valid and did not involve ultra vires acts by American Investors. These findings are supported by the evidence.

The court also made findings relative to the liability of National Capital Life Insurance Company, which are not questioned.

The trial court gave judgment to the bank against American Investors for attorney fees, and for interest on the loan from the date of its maturity. The court found the delay was caused by American Investors and it was properly charged as a cost. These findings are also supported by the record.

The principal issue raised on appeal by American Investors and the Commissioner is their assertion that the "guaranty" agreement is illegal and against public policy in New Mexico and in Utah. The plaintiffs assert that an insurance company such as American Investors cannot legally pledge its assets to guarantee a loan made to a third party.

As indicated above, the ultra vires issue was fully tried, but the record shows that an issue of illegality or against public policy was not. Such issues were included in the initial complaints, but no such claims or issues were included in the pretrial order. At the conclusion of the trial, the court said as part of its findings and conclusions:

> ". . . I do not conclude or find that the action of AIA was illegal in any respect, or against public policy. Further, that issue has not been litigated in the lawsuit; it was not my understanding that there was an issue here, and even if it were, I would rule against AIA on that position."

We must conclude that the illegality issue was not tried. The appellants urged that there was evidence introduced, but all they can point to is a copy of the Utah statutes relating to insurance companies which was admitted together with a large group of exhibits agreed upon before trial. No reference was made to this exhibit during trial. The attorney did argue to point in his final argument to the court. The issue was not raised in trial memoranda.

Issues not tried in the trial court cannot be considered on appeal to this court. This has to be the rule because the trial court is the only place where the initial fact-law relationship can be developed and the facts resolved. Black Crystal Coal Co. v. Garland Coal & Mining Co., 267 F.2d 569 (10th Cir.); Community National Life Ins. Co. v. Parker Square Savings & Loan Ass'n, 406 F.2d 603 (10th Cir.). This issue here argued is the kind of an issue which must be raised in the trial court; the illegality or public

policy relates only to corporate powers, and this aspect does not place such issues in a different category.

We also find no error in the action of the trial court in charging as costs against American Investors the interest on the loans after maturity. It was clearly the challenge by American Investors to the loan, and the litigation it began, which caused the delay.

The case is AFFIRMED.

APPENDIX C

Utah Code Ann. (1953)

Chapter 13, Title 31

CHAPTER 13

LOANS AND INVESTMENTS BY INSURERS

Section 31-13-1. Domestic insurers—Applicability of chapter to—Eligible investments.

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31-13-1. Domestic insurers—Applicability of chapter to —Eligible investments.—(1) This chapter shall apply only to domestic insurers unless otherwise specifically stated.

(2) Domestic insurers shall invest in or loan their funds on the security of, and shall hold as assets, only eligible investments as prescribed in this chapter.

(3) Any particular investment of a domestic insurer held by it on the effective date of this code and which was a legal investment immediately prior thereto shall be deemed a legal investment hereunder.

31-13-2. Investments—Requirements for eligibility—Foreign or alien insurers.—(1) No securities or other investments shall be eligible for purchase or acquisition under this chapter unless they are interest-bearing or income-paying, and are not then in default in any respect; except as to real property acquired and occupied by the insurer for home and branch office purposes.

(2) No security shall be eligible for purchase at a price above its market value.

(3) No provision of this chapter shall prohibit the acquisition by an insurer of other or additional securities or property if received as a dividend, or as a lawful distribution of assets or if acquired pursuant to a lawful and bona fide agreement of bulk reinsurance or consolidation. Any investments so acquired through bulk reinsurance or consolidation, which are not otherwise eligible under this chapter, shall be disposed of within a reasonable time if personal property or securities, or pursuant to section 31-13-18 if real property.

(4) The investments of a foreign or alien insurer shall be as permitted by the laws of the state of its domicile or entry, but shall represent investments of quality as high as those required under this chapter for similar funds of like domestic insurers, and otherwise the provisions of this chapter shall apply only to domestic insurers. Foreign and alien insurers' mortgage loans on real property located in the United States may be recognized in lieu of mortgage loans on real property located in this state as required by section 31-13-29 of this chapter.

31-13-3. Government bonds or other evidences of debt. —An insurer may invest any of its funds in bonds or other

evidences of debt, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed, or guaranteed by the United States or by any state thereof or by any territory or possession of the United States or by the District of Columbia or by any county, city, town, village, municipality or district therein or by a political subdivision thereof, or by the commonwealth of Puerto Rico or Canada or any of its provinces, or by any civil division or public instrumentality of one or more of the foregoing, if, by statutory or other legal requirements applicable thereto, the obligations are payable, as to both principal and interest, from taxes, levied or by law required to be levied upon all taxable property or all taxable income within the jurisdiction of such governmental unit, or from adequate special revenues pledged or otherwise appropriated or by law required to be provided for the purpose of such payment, but shall not include any category of securities issued by any such issuer if any other security of the same category issued by such issuer is then in default.

31-13-4. Limitation upon investments in securities of any one person, institution, municipality or municipal corporation.—An insurer shall not, except with the consent of the commissioner, have at any time any combination of investments in or loans upon the security of the obligations, property, and securities of any one person, institution, municipality, or municipal corporation aggregating an amount exceeding ten per cent of the insurer[']s assets. This section shall not apply to investments in or loans upon the security of general obligations of the government of the United States or of any state of the United States, nor to investments in foreign securities pursuant to section 31-13-19, nor include policy loans made pursuant to section 31-13-20.

31-13-5. Guaranteed obligations—Obligations secured by adequate collateral security—Fixed interest-bearing obli-

gations—Adjustment, income or other contingent interest obligations.—An insurer may invest any of its funds, up to an aggregate of not to exceed thirty-three and one-third per cent of its assets, in obligations, other than those eligible for investment under section 31-13-12 if they are issued, assumed, or guaranteed by any solvent institution created or existing under the laws of the United States or of any state, district or territory thereof, and which are qualified under any of the following paragraphs:

(1) Obligations which are secured by adequate collateral security and bear fixed interest and if during each of any three, including the last two, of the five fiscal years next preceding the date of acquisition by the insurer, the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges, as defined in section 31-13-6 have been not less than one and one-quarter times the total of its fixed charges for such year, or obligations which, at the date of such acquisition, are adequately secured and have investment qualities and characteristics wherein the speculative elements are not predominant. In determining the adequacy of collateral security, not more than one-third of the total value of such required collateral shall consist of stock other than stock meeting the requirements of section 31-13-8.

(2) Fixed interest-bearing obligations, other than those described in paragraph (1) of this section, if the net earnings of such institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by the insurer have averaged per year not less than one and one-half times its average annual fixed charges applicable to such period and if during the last year of such period such net earnings have been not less than one and one-half times its fixed charges for such year.

(3) Adjustment, income or other contingent interest obligations if the net earnings of the issuing, assuming or

guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by the insurer have averaged per year not less than one and one-half times the sum of its average annual fixed charges and its average annual maximum contingent interest applicable to such period and if during each of the last two years of such period such net earnings have been not less than one and one-half times the sum of its fixed charges and maximum contingent interest for such year.

31-13-6. Words and phrases defined—Determination of net earnings—Determination of net earnings—Computation of required coverage of fixed charges.—(1) Certain terms used are defined for the purposes of this chapter as follows:

(a) "Obligation" includes bonds, debentures, notes or other evidences of indebtedness.

(b) "Institution" includes corporations, joint-stock associations, and business trusts.

(c) "Net earnings available for fixed charges" means net income after deducting operating and maintenance expenses, taxes other than federal and state income taxes, depreciation and depletion, but excluding extraordinary nonrecurring items of income or expense appearing in the regular financial statements of such institution.

(d) "Fixed charges" includes interest on funded and unfunded debt, amortization of debt discount, and rentals for leased properties.

(2) If net earnings are determined in reliance upon consolidated earnings statements of parent and subsidiary institutions, such net earnings shall be determined after provision for income taxes of subsidiaries and after proper allowance for minority stock interest, if any; and the required coverage of fixed charges shall be computed on a

basis including fixed charges and preferred dividends of subsidiaries other than those payable by such subsidiaries to the parent corporation or to any other of such subsidiaries, except that if the minority common stock interest in the subsidiary corporation is substantial, the fixed charges and preferred dividends may be apportioned in accordance with regulations prescribed by the commissioner.

31-13-7. Application of earnings test.—In applying the earnings test defined in section 31-13-6 to any such institution, whether or not in legal existence during the whole of such five years next preceding the date of investment by the insurer, which has at any time after the beginning of such five-year period acquired the assets of any other institution or institutions by purchase, merger, consolidation, or otherwise, substantially as an entirety, or has been reorganized pursuant to the bankruptcy law, the earnings of such other predecessor or constituent institutions, or of the institution so reorganized, available for interest and dividends for such portion of such period as may have preceded such acquisition, or such reorganization, may be included in the earnings of such issuing, assuming, or guaranteeing institution for such portion of such period as may be determined in accordance with adjusted or pro forma consolidated earnings statements covering such portion of such period and giving effect to all stock or shares outstanding, and all fixed charges existing, immediately after such acquisition, or such reorganization.

31-13-8. Investment of funds in stocks.—(1) An insurer may invest any of its funds, in aggregate amount not exceeding at cost twenty per cent of its assets, in preferred or guaranteed stocks or shares, other than common stocks, of solvent institutions existing under laws of the United States or of any state, district, or territory thereof, if all of the prior obligations and prior preferred stocks, if any, of such institutions at the date of acquisition by the in-

surer are eligible as investments under this chapter; and if qualified under either of the paragraphs following:

(a) Preferred stocks or shares shall be deemed qualified if both these requirements are met:

(a1) The net earnings of the institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by the insurer must have averaged per year not less than one and one-half times the sum of its average annual fixed charges, if any, its average annual maximum contingent interest, if any, and its average annual preferred dividend requirements applicable to such period; and

(a2) during each of the last two years of such period such net earnings must have been not less than one and one-half times the sum of its fixed charges, contingent interest and preferred dividend requirements for such year. The term "preferred dividend requirements" shall be deemed to mean cumulative or noncumulative dividends whether paid or not.

(b) Guaranteed stocks or shares shall be deemed qualified if the assuming or guaranteeing institution meets the requirements of section 31-13-5 (1), construed so as to include as a fixed charge the amount of guaranteed dividends of such issue or the rental covering the guarantee of such dividends.

(2) No insurer shall invest in or loan upon any preferred stock or shares of any one institution in excess of ten per cent of the total issued and outstanding preferred stock or shares of such institution. This limitation shall not apply to such shares of an insurer which is the subsidiary of a domestic insurer.

31-13-9. Obligations issued by trustees or receivers.—An insurer may invest any of its funds, in aggregate amount not exceeding two per cent of its admitted assets,

in certificates, notes, or other obligations issued by trustees or receivers of institutions existing under the laws of the United States or of any state, district, or territory thereof, which, or the assets of which, are being administered under the direction of any court having jurisdiction, if such obligation is adequately secured as to principal and interest.

31-13-10. Bills of exchange.—An insurer may invest any of its funds, in aggregate amount not exceeding two per cent of its admitted assets, in bank [illegible] bankers' acceptances and other bills of exchange of the kind and maturities made eligible, pursuant to law, for purchase in the open market by federal reserve banks.

31-13-11. Equipment trust obligations or certificates.—An insurer may invest any of its funds, in aggregate amount not exceeding ten per cent of its admitted assets, in equipment trust obligations or certificates which are adequately secured instruments evidencing an interest in transportation equipment wholly or in part within the United States and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment.

31-13-12. Bonds or other evidences of debt secured by mortgage or deed of trust—Purchase money mortgages.—An insurer may invest any of its funds in:

(1) bonds or evidences of debt which are secured by first mortgages or deeds of trust on improved unencumbered real property, or any interest therein, located in the United States, the commonwealth of Puerto Rico, or Canada and in chattel mortgages in connection therewith pursuant to section 31-13-16;

(2) the equity of the seller of any such property in the contract for a deed, covering the entire balance due on a bona fide sale of such property, in amount not to exceed

80% of the actual sale price or fair value of the property, whichever is the smaller;

(3) purchase money mortgages or like securities received by it upon the sale or exchange of real property acquired pursuant to section 31-13-17;

(4) bonds or notes secured by mortgage or trust deed guaranteed or insured by the Federal Housing Administration under the terms of an Act of Congress of the United States of June 27, 1934, entitled the "National Housing Act," as heretofore or hereafter amended;

(5) bonds or notes secured by mortgage or trust deed guaranteed as to principal by the Administrator of Veterans' Affairs pursuant to the provisions of Title III of an Act of Congress of the United States of June 22, 1944, entitled the "Servicemen's Readjustment Act of 1944," as heretofore or hereafter amended;

(6) evidence of debt secured by first mortgages or deeds of trust upon leasehold estates, running not less than 10% of the lease term beyond the maturity of the loan as made or as extended, in improved real property, otherwise unencumbered, if the mortgagee is entitled to be subrogated to all the rights under the leasehold;

(7) bonds or evidences of debt which are secured by first mortgages or deeds of trust on unimproved and unencumbered real property located in the United States, the commonwealth of Puerto Rico or Canada, but only if the present value of the insurer's investments under this subsection and investments in unimproved real estate under section 31-13-17(8) do not exceed the limitations on acquisition of unimproved property expressed in section 31-13-17(8).

31-13-13. Margin of safety required in loans secured by mortgage or deed of trust—Requirements—Exceptions.—(1) The amount of any loan secured by mortgage or deed of trust shall not exceed 80% of the value of the real estate interest mortgaged unless:

(a) the loan is also secured by the mortgagor's interest in a lease or leases whose aggregate rentals shall be sufficient, after payment of operating expenses and fixed charges, to repay 90% of the loan with interest thereon during the initial term or terms of the lease or leases and shall be payable directly or indirectly by any governmental units, instrumentalities, agencies or political subdivisions.

(b) the excess over the 80% is insured or guaranteed or to be insured or guaranteed by the United States, this or any other state of the United States, the commonwealth of Puerto Rico, Canada, or any instrumentality, agency or political subdivision of one or more of the foregoing.

(2) Any insurer may hold a participation in any mortgage loan referred to in section 31-13-12 if:

(a) the participation is senior and gives the holder substantially the rights of a first mortgagee, or

(b) the interest of the insurer in the evidence or evidences of indebtedness is of equal priority, to the extent of such interest, with other interests therein.

(3) Any mortgage loan secured as provided in this section whose maturity date shall be more than two years after the date of disbursement of the loan, and which exceeds two-thirds of the value of the interest mortgaged as of the date of the mortgage shall, as a minimum, provide for payments to be made by the borrower during the term of the loan to amortize the amount by which the loan exceeds two-thirds, of the value of the interest mortgaged as of the date of disbursement. The commissioner may promulgate supplemental regulations as he deems necessary with regard to particular classes of those investments, taking into consideration the type of security and the ratio of the loan to the value of the real estate interest mortgaged.

(4) Fee simple or leasehold real estate or any interest therein shall not be deemed to be encumbered within the meaning of section 31-13-12 by reason of:

(a) the existence of taxes or assessments that are not delinquent, or

(b) encumbrances that do not adversely affect the salability of the property to a material extent or as to which the insurer is insured against loss by a title insurer, or

(c) any lease or sublease of part or all of the property, or

(d) any prior mortgage or trust deed held or assumed by the insurer as a lien on the property if the aggregate of the mortgages or trust deeds held shall not exceed 70% of the appraised value of the property and if the security created by the prior mortgage or trust deed is a first lien.

(5) The value of the real estate interest mortgaged shall be determined by a competent appraiser.

(6) Buildings and other improvements on the mortgaged premises must be insured against fire loss for the benefit of the mortgagee in an amount not less than the unpaid balance of the obligation or the insurable value if lesser.

31-13-16. Mortgage loan on real property—Amount of loan—"Durable equipment" defined—Chattel mortgages.—(1) In connection with a mortgage loan on the security of real property designed and used primarily for residential purposes only, acquired pursuant to section 31-13-12, an insurer may loan or invest an amount not exceeding twenty per cent of the amount of such real property mortgage, on the security of a chattel mortgage for a term of not more than three years representing a first and prior lien, except for taxes not then delinquent, on personal property constituting durable equipment owned by the mortgagor and kept and used in the mortgaged premises.

(2) The term "durable equipment" shall include only mechanical refrigerators, mechanical laundering machines, heating and cooking stoves and ranges, automatic water heating facilities, mechanical kitchen aids, vacuum cleaners,

and fire extinguishing devices; and in addition in the case of apartment houses and hotels, room furniture and furnishings.

(3) Prior to acquisition of a chattel mortgage items of property to be included shall be separately appraised by a competent appraiser and the market value thereof determined. No such chattel mortgage loan shall exceed in amount the same ratio of loan to the fair value of the property as is applicable to the companion loan on the real property.

31-13-17. Ownership of and investments in real property —Home office building—Real property acquired by purchase and in other ways than by purchase.—An insurer may own and invest or have invested any of its funds, in aggregate amount not exceeding twenty per cent of its assets, in real property, and in repair, alteration, furnishing, or improvement hereof, as follows only:

(1) in its home office building and land occupied thereby, not to exceed five per cent of its assets unless approved by the commissioner, or if a mutual insurer not to exceed such amount as would reduce its surplus, exclusive of such investment, below fifty thousand dollars unless approved by the commissioner;

(2) other real property requisite for its accommodation in the convenient transaction of its business;

(3) real property acquired in satisfaction or on account of loans, mortgages, liens, judgments, or other debts previously owing to the insurer in the course of its business;

(4) real property acquired by gift or devise;

(5) real property acquired in exchange for real property owned by it. If necessary in order to consummate such an exchange, the insurer may put up cash in amount not to exceed twenty per cent of the asset value of its real property to be so exchanged, in addition to such property;

(6) real property acquired through a lawful merger of another insurer and not required for the purposes specified in paragraphs (1) and (2) of this section;

(7) real property and equipment incident to real property, requisite or desirable for the protection or enhancement of the value of other real property owned by the insurer;

(8) real property or any interest therein acquired by purchase, case or otherwise for the production of income or to be improved or developed for such purpose, which real property or any interest therein, and any improvements thereon, it may thereafter hold, own, maintain, improve, develop, manage, lease, collect or receive income from, or sell or convey. Real property or any interest therein acquired pursuant to any other provision of this chapter may be elected to be held under this subsection. The amount invested in unimproved real estate and in obligations secured by mortgages or deeds of trust on unimproved real property shall not exceed 20% of the insurer's surplus.

31-13-18. Disposal of unncessary real estate holdings.—Limitations on timet for disposal of.—(1) Real property acquired by an insurer pursuant to paragraphs (1) and (2) of section 31-13-17 shall be disposed of within five years after it has ceased being necessary for the use of such insurer in the transaction of its business. Real property acquired by such insurer pursuant to paragraphs (3), (4), (5), and (6) of section 31-13-17 shall be disposed of within five years after date of acquisition, and real property acquired under paragraph (7) of 31-13-17 shall be disposed of within five years after it has ceased to serve the purpose for which it was acquired. The time for any such disposal may be extended by the commissioner for a definite additional period or periods upon application and proof that forced sale of the property, otherwise necessary, would work a material hardship upon such insurer.

(2) Any such real property held by such insurer beyond the time permitted for its disposal shall not be carried or allowed as an asset.

31-13-19. Insurers authorized to do business in foreign countries—Investments—Eligible securities.—An insurer authorized to transact insurance in a foreign country may invest any of its funds, in aggregate amount not exceeding its obligations incurred in such country, in securities of or in such country possessing characteristics and quality similar to those required pursuant to this chapter for investments in the United States.

31-13-20. Loans to policyholders—Limitations on loans—Loans eligible as investments.—A life insurer may loan to its policyholder upon the pledge of the policy as collateral security, any sum not exceeding the cash surrender value of the policy; or may lend against pledge or assignment of any of its supplementary contracts or other contracts or obligations, so long as the loan is adequately secured by such pledge or assignment. Loans so made are eligible investments of the insurer.

31-13-21. Investments—Share accounts of savings and loan institutions.—An insurer may invest any of its funds, in aggregate amount not exceeding twenty per cent of its admitted assets, in share accounts of savings and loan institutions, and in any one such institution only to the extent that such an account is insured by the Federal Savings & Loan Insurance Corporation under the provisions of Title IV of an Act of Congress entitled the "National Housing Act."

31-13-22. Insurers other than life insurers—Stocks of other insurers—Investments by life insurers in insurance stocks—Limitations upon investments in insurance stocks.—(1) Within the limits and standards of section 31-13-23, an insurer other than a life insurer may invest a portion of its surplus funds in aggregate amount not exceeding

fifty per cent of its surplus over its capital stock and other liabilities, or thirty-five per cent of its capital funds, whichever is greater, in the stocks of other insurers organized and existing under the laws of the state of the United States.

(2) Within the limits and standards of section 31-13-23, a life insurer may invest in aggregate amount not exceeding at cost five per cent of its admitted assets, or not exceeding at cost twenty-five per cent of its surplus over its capital stock and other liabilities, or of surplus over its required minimum surplus if a mutual or reciprocal insurer, whichever amount is the greater, in insurance stocks.

(3) An insurer shall not purchase or hold as an investment more than ten per cent of the voting stock of any other insurer, and subject further to amount invested as limited by section 31-13-4. This limitation shall not apply if such other insurer is the subsidiary of, and substantially all its shares having voting power are owned by a domestic insurer.

(4) No insurance stock shall be eligible as an investment unless it meets the qualifications for stock of other corporations as set forth in section 31-13-23.

(5) The limitations on investment in insurance stocks set forth in this chapter shall not apply to stocks acquired under a plan for merger of two or more insurers which has been approved by the commissioner, or to shares received as stock dividends upon shares already owned.

(6) In addition to investments permissible under subsections (2) and (3) of this section, and without regard to the provisions and limitations of sections 31-13-2 (1) and 31-13-4, a life insurance company may invest in, or otherwise acquire, the stocks, including voting trust certificates, certificates of deposit, interim receipts and other similar instruments representing such stock, of one or more sol-

vent domestic or foreign insurance corporations, or of one or more solvent domestic or foreign corporations engaged in a business complementary or supplementary to the life insurance business, under the following conditions:

(a) No investment authorized by subsection (6) of this section shall be retained by the insurer unless at all times after one year from the date of acquisition the insurer holds a majority of the total issued and outstanding stocks or shares of such corporation having voting powers. No such investments in excess of ten per cent of the total issued and outstanding common stocks or shares of such corporation shall be acquired unless a notice of intention of proposed acquisition shall have been filed with the commissioner of insurance not less than ninety days in advance of the proposed acquisition, provided that the commissioner may waive the ninety-day waiting period and at any time after such filing disapprove such acquisition and order its disposition if he finds that it does not meet the requirements of this subsection.

(b) The commissioner may authorize acquisition or retention of less than a majority of the total issued and outstanding stocks or shares of a foreign insurance corporation having voting powers, if he finds that (1) under the law of the domicile of such corporation acquisition or retention of a majority is impracticable or unfeasible, and (2) acquisition or retention of less than a majority will not be prejudicial to the interests of the domestic life insurance company's policyholders or members or of the people of this state.

(c) For purposes of this subsection, any corporation the stocks of which have been acquired and are being retained by a life insurance company pursuant to paragraphs (a) and (b) hereof shall be deemed the subsidiary of such insurer.

(d) For purposes of this subsection, total investment by a life insurance company in a subsidiary organized or

acquired pursuant to this subsection shall include said company's loans, advances, contributions to each subsidiary, its holdings of bonds, notes and stocks of such subsidiary, and interests therein of any other subsidiary or subsidiaries of such life insurance company. The total investment by a life insurance company in subsidiaries organized or acquired pursuant to this subsection shall not be allowed as an admitted asset in excess of fifty per cent of its capital and surplus determined immediately after such acquisition, except that if the commissioner determines that it would not be prejudicial to the interest of the policyholders or stockholders of the insurer or subsidiary or the people of this state, he may approve a greater investment in subsidiaries, provided that the investment shall not be allowed as an admitted asset in an amount more than fifteen per cent of the insurer's total admitted assets, including the stock of the subsidiaries determined immediately after acquisition. Thereafter any further investments in subsidiaries shall be subject to approval by the commissioner.

(e) The name of any corporation which is a subsidiary of a life insurance company shall not be such as to mislead or deceive the public.

(f) Any subsidiary acquired by a life insurance company pursuant to this subsection shall make no investment in or loan or advance to the parent corporation or to any affiliate or other subsidiary of the parent corporation; and, except with the approval of the commissioner as not prejudicial to the interests of the policyholders or stockholders of such corporations or of the people of this state, none of such corporations shall make transfers to any other such corporations of any of its assets, other than transfers in connection with reasonable fees and expenses, interest, premiums and annuity considerations, debt repayments and dividends. The assets of insurance subsidiaries which do not comply with the provisions of this

chapter shall be excluded in determining the admitted asset value of the investment in the subsidiary.

(g) This subsection shall have no application to a fraternal benefit society, title insurer or reciprocal insurer.

31-13-23. Shares of solvent corporations.—(1) Life insurers may invest not to exceed at cost ten per cent of their admitted assets or not to exceed at cost twenty-five per cent of their unassigned surplus, whichever is the greater, in common shares of solvent corporations incorporated under the laws of any of the states among the United States of America, which have earned during any three years of the five years next preceding the date of the investment a sum applicable to dividends equal in the aggregate to not less than twelve per cent of the par value (or, if no par value shares, the issued value), of its outstanding shares, or if such shares have been issued less than five years, have earned a sum applicable to dividends during the tenure of such issue, equal to not less than four per cent per annum of the par value (or of issued value, if shares are without par value) of its outstanding shares, except that not more than ten per cent of the amount authorized under this subsection may be invested in newly issued shares of stock.

(2) All other insurers may invest funds in aggregate amount not to exceed at cost fifty per cent of its assets, in common shares, of solvent United States corporations, which have earned during any three years of the five years next preceding the date of the investment a sum applicable to dividends equal in the aggregate to not less than twelve per cent of the par value (or, if no par value shares, the issued value), of its outstanding shares, or if such shares have been issued less than five years, have earned a sum applicable to dividends during the tenure of such issue, equal to not less than four per cent per annum of the par value (or of issued value, if shares are without par value) of its outstanding shares, except that not more than ten

per cent of the amount authorized under this subsection may be invested in newly issued shares of stock.

31-13-24. Loans of funds—Pledge and collateral security—Limitations upon amount of loan.—An insurer may loan its funds upon the pledge of securities or evidences of debt eligible for investment under this chapter. As at date made, no such loan shall exceed in amount seventy-five percent of the market value of such collateral pledged, except that loans upon pledge of United States government bonds may be equal to the market value of the pledge. The amount so loaned shall be included in the maximum percentage of funds permitted to be invested in the kinds of securities or evidences of debt pledged or permitted by section 31-13-4.

31-13-25. Eligibility of loan—Limitations on amount of loan—Record of investments.—(1) An insurer may loan or invest its funds in aggregate amount not exceeding the lesser of the following sums: five per cent of its assets, or fifty per cent of its surplus over its capital and liabilities, or if a mutual or reciprocal insurer fifty per cent of its surplus over minimum required surplus, in kinds of loans or investments not otherwise specifically made eligible for investment and not specifically prohibited or made ineligible by this or other provisions of this code.

(2) No such loan or investment shall be represented by

(a) any asset not allowed as defined in section 31-12-1;

(b) any loan or investment of a kind specifically made eligible under any other provision of this code;

(c) any loan, investment, or asset theretofore acquired or held by the insurers under any other category of loans or investments.

(3) No one such investment or loan shall exceed the amount specified in paragraph (1) of this section or one per cent of the insurer's assets, whichever is the lesser.

(4) The insurer shall keep a separate record of all investments acquired under this section.

31-13-26. Investments—Duty of insurers to invest funds and keep same invested—Exception of title and mutual insurers.—(1) An insurer shall invest and keep invested its funds aggregating in amount, if a stock insurer, not less than sixty per cent of its paid-in-capital, or not less than one hundred per cent of its minimum required capital, whichever is the greater amount, or if a mutual or reciprocal insurer, not less than one hundred per cent of its required minimum surplus, in investments eligible in accordance with section 31-13-3, and in mortgage loans on real property located within this state, pursuant to section 31-13-12.

(2) In addition to the investments required in paragraph (1) of this section, an insurer shall invest and keep invested its funds aggregating not less than any remainder of its paid-in capital stock and one hundred per cent of its required reserves in investments eligible in accordance with the following sections: 31-13-3, 31-13-5, 31-13-8, 31-13-9, 31-13-10, 31-13-11, 31-13-12, 31-13-16, 31-13-17, 31-13-19, 31-13-20, 32-13-21, 31-13-23, and 31-13-24.

(3) This section shall not apply to title insurers or to mutual insurers on the assessment premium plan.

31-13-27. Valuation of investments by commissioner.—All investments shall be valued by the commissioner in accordance with then current business practices but not inconsistent with any method then current, formulated or approved by the National Association of Insurance Commissioners.

31-13-28. Approval of investments, loans or sales—Minutes and report.—No investment, loan, or sale thereof, shall, except as to the policy loans of a life insurer, be made by any domestic insurer unless authorized or approved by its board of directors or by a committee thereof

charged with the duty of making such investment, loan, or sale. The minutes of any such committee shall be recorded and a report shall be submitted to the board of directors at its next meeting.

31-13-29. Written record of investments or loans required.(1) With each investment or loan of the funds of a domestic insurer a written record thereof in permanent form shall be made, signed by the officer or chairman of the committee of the board of directors authorizing such investment or loan.

31-13-30. Depositaries for insurance funds—Necessity for commissioner's approval.—The funds of an insurer shall not be deposited in any bank or banking institution which has not first been approved by the commissioner.

31-13-32. Separate accounts for life insurance or annuity benefits payable in fixed or variable amounts—A domestic life insurance company may establish one or more separate accounts, and may allocate thereto amounts (including without limitation proceeds applied under optional modes of settlement or under dividend options) to provide for life insurance or annuities (and benefits incidental thereto), payable in fixed or variable amounts or both, subject to the following:

(1) The income, gains and losses, realized or unrealized, from assets allocated to a separate account shall be credited to or charged against the account, without regard to other income, gains or losses of the company.

(2) Except as may be provided with respect to reserves for guaranteed benefits and funds referred to in paragraph (3) of this section, (a) amounts allocated to any separate account and accumulations thereon may be invested and reinvested without regard to any requirements or limitations prescribed by the laws of this state governing the investments of life insurance companies and (b) the investments in such separate account or accounts shall not be

taken into account in applying the investment limitations otherwise applicable to the investments of the company.

(3) Except with the approval of the commissioner and under the conditions as to investments and other matters as he may prescribe, which shall recognize the guaranteed nature of the benefits provided, reserves for (a) benefits guaranteed as to dollar amount and duration, and (b) funds guaranteed as to principal amount or stated rate of interest shall not be maintained in a separate account.

(4) Unless otherwise approved by the commissioner, assets allocated to a separate account shall be valued at their market value on the date of valuation, or if there is no readily available market, then as provided under the terms of the contract or the rules or other written agreement applicable to that separate account; provided, that unless otherwise approved by the commissioner, the portion if any of the assets of that separate account equal to the company's reserve liability with regard to the guaranteed benefits and funds referred to in paragraph (3) of this section shall be valued in accordance with the rules otherwise applicable to the company's assets.

(5) Amounts allocated to a separate account in the exercise of the power granted by this section shall be owned by the company, and the company shall not be, nor hold itself out to be, a trustee with respect to these amounts. If and to the extent so provided under the applicable contracts, that portion of the assets of any separate account equal to the reserves and other contract liabilities with respect to that account shall not be chargeable with liabilities arising out of any other business the company may conduct.

(6) No sale, exchange or other transfer of assets may be made by a company between any of its separate accounts or between any other investment account and one or more of its separate accounts unless, in case of a transfer into a separate account, the transfer is made solely to establish the account or to support the operation of the contracts

with respect to the separate account to which the transfer is made, and unless the transfer, whether into or from a separate account, is made (a) by a transfer of cash, or (b) by a transfer of securities having a readily determinable market value, provided that the transfer of securities is approved by the commissioner. The commissioner may approve other transfers among these accounts if, in his opinion, the transfers would not be inequitable.

(7) To the extent a domestic life insurance company deems it necessary to comply with any applicable federal or state laws, that company, with respect to any separate account, including without limitation any separate account which is a management investment company or a unit investment trust, may provide for persons having an interest therein appropriate voting and other rights and special procedures for the conduct of the business of that account, including without limitation special rights and procedures relating to investment policy, investment advisory service, selection of independent public accountants, and the selection of a committee, the members of which need not be otherwise affiliated with that domestic life insurance company, to manage the business of that account.

31-13-33. Variable contracts—Statements as to basis of benefits.—Any contract providing benefits payable in variable amounts delivered or issued for delivery in this state shall contain a statement of the essential features of the procedures to be followed by the insurer in determining the dollar amount of those variable benefits. Any of these contracts under which the benefits vary to reflect investment experience, including a group contract and any certificate in evidence of variable benefits issued under this type of contract, shall state that the dollar amount will so vary, and shall contain on its first page a statement to the effect that the benefits stated in the contract are on a variable basis.

31-13-34. Insurers issuing variable contracts.—Approval by commissioner.—No insurer shall deliver or issue for delivery within this state variable contracts unless it is licensed or organized to do a life insurance or annuity business in this state, and the commissioner is satisfied that the insurer's condition or method of operation in connection with the issuance of variable contracts will not render its operation hazardous to the public or its policyholders in this state. In this connection, the commissioner shall consider among other things:

(1) The history and financial condition of the insurer;

(2) The character, responsibility and fitness of the officers and directors of the insurer; and

(3) The law and regulation under which the insurer is authorized in the state of domicile to issue variable contracts.

If the insurer is a subsidiary of an admitted life insurance company, or affiliated with an admitted life insurance company through common management or ownership, it may be deemed by the commissioner to have met the provisions of this section if either it or the parent or the affiliated company meets the requirements hereof.

31-13-35. Issuance and sale of variable contracts—Regulation by commissioner.—Notwithstanding any other provision of law, the commissioner shall have sole authority to regulate the issuance and sale of variable contracts, and to issue all reasonable rules and regulations as may be appropriate to carry out the purposes and provisions of sections 31-13-32, 31-13-33 and 31-13-34.

31-13-36. Application of insurance laws to separate accounts and contracts relating to separate accounts—Grace, reinstatement and nonforfeiture provisions required—Reserve liability.—Except for sections 31-22-2, 31-22-7, 31-

22-8, 31-22-9, 31-22-13, and 31-23-8, and except as otherwise provided in this section, all pertinent provisions of Title 31 shall apply to separate accounts and contracts relating to separate accounts. Any individual or group variable contracts, delivered or issued for delivery in this state if appropriate to the contract, shall contain grace, reinstatement and nonforfeiture provisions.

The reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees.